IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 34

TIMES FILM CORPORATION, *Petitioner*,

v.

CITY OF CHICAGO, ET AL., *Respondents*.

MOTION FOR LEAVE TO FILE BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PETITION FOR REHEARING AND BRIEF

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The National Association of Broadcasters respectfully moves for leave to file in support of the Petition for Rehearing of the decision of the Court entered in this case on January 23, 1961. Because of the time element, it was not possible to secure the consent of the Respondent to this Motion.

The National Association of Broadcasters, hereinafter called the Association, is a non-profit organization of radio and television broadcasters whose membership included as of February 15, 1961, 1720 AM

stations, 567 FM stations, 363 TV stations and all the radio and television nation-wide networks.

The interest of the Association in supporting the Petition for Rehearing in this case stems from one of the Association's basic objectives as set forth in its Bylaws, "To do all that is necessary and proper to encourage and promote customs and practices which will strengthen and maintain the broadcasting industry to the end that it may best serve the public".

We respectfully submit that the case at hand involves grave problems for all media. In our view, it would be extremely difficult to limit its influence to moving pictures, for what disrupts the basic freedoms guaranteed by the First Amendment with respect to one medium affects all others. To have real meaning, must not the constitutional guarantee of free speech and press be extended on an equal basis to all channels of communication? It would be anomalous indeed to suggest that these freedoms should not be applicable to any new media of communication which might be produced in the future. While freedom of the press is normally associated with, and had its historical genesis in, the publication of printed matter, it seems clear that its protection should not and cannot be limited to this medium. Any other conclusion would necessarily create a situation in which competing channels of communication would be placed at a relative disadvantage. If one were to be given a preference over another, inequitable influence would be given to the owners of the legally favored medium and there would result a serious impingement of the guarantee of equal protection of the laws.

This thought is sharpened by the fact that while the majority of the court in the instant case would limit

the effect of the decision to motion pictures, no justification is made for treating movies differently than other vehicles used for the dissemination of ideas and information. Are we to surmise that the court presumes that motion pictures are potentially lewd, and hence, it is permissible to authorize the prescreening of all in order to control some?

May not the use of this method of censorship to curb one medium be applied with equal logic to another? Admittedly, the rule against prior restraints upon a free press like all rules of freedom is not an absolute. Nevertheless, the occasions upon which such may be permitted are extremely limited. *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697 (1931); *Kovacs* v. *Cooper,* 336 U. S. 77 (1949); *Kingsley Books, Inc.* v. *Brown,* 354 U. S. 436 (1957).

In all of these cases it was indicated that under very exceptional circumstances a prior restraint might be justified. But no exceptional circumstance has been shown to exist in the case at bar, other than the fact that the medium concerned was a film rather than a book, a newspaper, or a radio script.

The sole question is not whether there exists an inherent right to show all motion pictures at least once no matter how obscene or inflammatory their content might be, but whether any city may require all motion picture exhibitors to submit all films for licensing and censorship prior to public exhibition. Indeed, we reiterate that unless a reasonable basis can be found for distinguishing movies from other media, equal protection of laws would seem to give validity to like censorship schemes for newspapers, books, magazines, radio and television. This appears to be especially true in view of the fact that neither the

standards of the ordinance itself nor the contents of the picture had any bearing upon the majority decision. The basic fundamental right of freedom of speech may not be so casually discarded to promote administrative convenience. If such a tenuous circumstance could be so established, could not the government require that all newspapers be submitted to a censor in order to assist it in preventing information from reaching print? Perhaps the court assumes that in the case of other media the people have adequate protection through ordinary judicial processes of criminal action and/or injunctive relief. We submit that this is not a sound assumption. But even if true, what is vital to freedom of expression and distinguishes a free society from a police state is that there be no prior censorship of any media . . . that no official may lawfully say in advance, this is approved and may be published, or this is not approved and, hence, may not be published. This is no more than a restatement of Madison's phrase:

> "It is better to leave a few of the noxious branches to their luxurious growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits."

Finally, we would like to call attention to what might be considered to be something of a paradox. The instant case would permit the submission to an administrative body for approval of all motion pictures to be exhibited in theaters in Chicago; yet, those same films may be shown without prior submission or license over any television station in that very city. This issue was resolved in *Allen B. Dumont Laboratories* v. *Carroll*, 184 Fed. 2d 153 (CA 3 1950) *cert. denied* 340 U. S. 929, where the court denied the right

of a state to pass upon films to be shown over television. Yet, as this court understands, the televising of a film may reach many times the audience that the showing of that same film would if projected in a local theater.

Much of what is shown on television is either filmed or taped. Indeed, to adjust to the differences in time zones between various sections of the country, the recent Presidential Debates were taped for subsequent transmission. We would assume the court intends to draw no distinction between tape and film since both serve identical purposes. Would then a federal statute requiring the submission of all television films or tapes to a central body be considered valid on its face? We would trust not. Assuming clearance is necessary, the delay in broadcasting would prove destructive. Just as justice delayed is justice denied, so it is true that news delayed is news denied. The democratic process is dependent upon unhampered communications, and only the most serious and substantial evils should justify interference with this freedom.

These then are the matters we believe the court would wish to consider and which we would seek to pursue further as Amicus in the event the Petition for Rehearing is granted.

Respectfully submitted,

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